UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NP SUNSET LLC D/B/A SUNSET STATION HOTEL & CASINO **and** **LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS A/W UNITE HERE INTERNATIONAL UNION**	**Case No. 28-RC-242249**

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

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Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, NP Sunset LLC d/b/a Sunset Station Hotel & Casino ("Sunset" or the "Employer") hereby requests review of the Decision and Certification of Representative ("Certification") issued by the Regional Director of Region 28 ("Regional Director") on November 5, 2019.

I. INTRODUCTION

Because the Local Joint Executive Board of Las Vegas a/w UNITE HERE International Union ("Union") could not itself enter into Sunset's property to engage in election-day campaigning, it encouraged its Committee Leaders and other supporters acting at the Union's direction, to do so on behalf of the Union (collectively, the "Supporters"). Those Supporters, with the Union's authorization and ratification, stationed themselves throughout Sunset's property on the day of the election, including in the first-floor hallway/executive elevator area that employees pass through in order to go to the polls. As these Supporters were acting at the Union's direction and with the Union's authorization, knowledge, and ratification, they were the Union's special agents for purposes of such conduct. The Regional Director misapplied Board agency law and ignored the facts established at the hearing when concluding that the Supporters were not special agents of the Union on the day of the election.

The very presence of the Supporters in the pathway to the voting area was clearly objectionable under well-established Board law. In concluding otherwise, the Regional Director focused exclusively on whether the Supporters engaged in any coercive speech or electioneering while they were stationed in the hallway. The flaw in the Regional Director's analysis is that the mere presence of the Supporters was objectionable as a matter of law, regardless of whether they engaged in any further coercive conduct: "a party engages in objectionable conduct sufficient to

set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001).

In addition, as a part of the Union's pre-election campaign, the Union created and disseminated a comprehensive photo booklet of employees purporting to pledge their support for the Union which, as a natural by-product, served to identify those employees that had withheld their support from the Union. The Regional Director erroneously minimized the damaging impact of this booklet on employee's statutory right to refrain entirely from Section 7 activity. Further, as set forth below, the booklet paints a false picture of Union support and creates a potentially coercive sense of obligation to the Union for those employees that agree to allow the Union to use their identities. Sunset maintains that Board law concerning the dissemination of the identities of individuals who intend to vote for the Union is wrongly decided. But even under extant Board law, the Regional Director erred by failing to consider the impact of the booklet in concert with the presence of the Union Supporters. The Union's booklet permitted employees to identify not only those employees who support the Union, but also inversely identified those who did not support the Union. A presumed "no" voter should not have to pass through a gauntlet of electoral adversaries, who know how she intends to vote, in order to cast her vote. Such a situation is plainly intimidating – akin to requiring an employee to cross a hostile picket line in order to vote.

Despite the conduct of the Union and its special agent Supporters, as summarized above, the Regional Director adopted the Hearing Officer's report overruling Sunset's objections and certified the results of the election that had been tainted by the Union's misconduct. Compelling reasons exist for the Board to review the Certification because: (1) the Regional Director's determination that the Supporters were not Union special agents departs from Board law; (2) the

Regional Director's determination that the presence of a party's agents in the pathway to the polls is not objectionable departs from Board and appellate law; (3) there is an absence of Board law considering how the rights of Union supporters to openly advertise their support should be balanced against the Section 7 rights of non-Union supporters not to have their lack of support for the Union broadly disseminated (*i.e.*, to refrain from Section 7 activity) or, alternatively, Board law in this area should be reconsidered; and (4) the Regional Director departed from Board law in failing to consider the combined impact of the dissemination of the photo booklet with the presence of Union agents in the pathway to the polls. The Board should grant the Employer's Request for Review, set aside the Certification and vacate the results of the election.

II. STATEMENT OF THE CASE

A. Procedural Background

On May 28, 2019, the Union petitioned to represent the petitioned-for bargaining unit. (Ex. A, HO Report at p. 3.)[1] The parties reached a Stipulated Election Agreement and the election was held on June 13. (*Id.*) The Union received a majority of the valid votes cast. (*Id.*)

The Employer submitted timely objections to the election. (Ex. B.) As relevant here, the Employer objected that the Union supporters were stationed in the pathway to the voting area; that the Union's distribution of the "We Are Sunset Station" booklet (*See* Ex. C, ER Ex. 7 to Election Objections Hearing)[2] was objectionable both because of its impact on the putative "Yes" voters identified in the booklet, and because it inversely identifies putative "No" voters through their absence in the booklet; and that, in concert, this conduct was particularly

[1] All cited pages from the Hearing Officer's Report on Objections ("HO Report") are attached under Exhibit A.

[2] All cited Employer's exhibits ("ER Ex.") from the election objections hearing are attached under Exhibit C.

objectionable as putative "no" voters were required to pass through a small crowd of their electoral adversaries – who had the capacity to identify them as likely "No" voters – in order to exercise their right to vote. (*Id.*) The hearing on the Employer's objections was held on July 11-12, and the Hearing Officer issued her report on August 6.

The Employer timely filed exceptions to the Hearing Officer's Report to the Regional Director on August 20, 2019. The Regional Director overruled the Employers' exceptions and issued the Certification on November 5, 2019. (Ex. D)

B. The "We Are Sunset Station" Booklet

In the weeks leading up to the election, the Union compiled and disseminated a booklet entitled "We Are Sunset Station" containing photographs of 363 bargaining unit employees who purportedly intended to vote "Yes" in the election. (HO Report at p. 6.) The booklet was publicly distributed to bargaining unit employees – including those whose pictures were not in the booklet – on Sunset property prior to the election. (*Id.*; Ex. E, Election Objections Hearing Transcript ("Tr.") 100:3-9.)[3] As a result, any interested person could determine whether an individual was a likely "Yes" voter (indicated by their presence in the booklet), or a likely "No" voter (indicated by their absence in the booklet). (*See* Tr. 92:3-7 (bargaining unit employee testifying that she was "shocked" to see the booklet because she believed voting was a private matter).) While the Union obtained releases from the individuals whose pictures appeared in the booklet, those individuals who chose to refrain from supporting the Union did not in any manner consent to the disclosure of their choice to refrain from voting for or supporting the Union. (*See* Report p. 6; Tr. 101:23-24.)

[3] All cited transcript pages from the pre-election hearing are attached under Exhibit E.

C. The Union Stations Committee Leaders and Other Supporters in the Pathway to the Voting Area

As the Union acknowledges, only the Employer's employees are permitted to campaign on the Employer's property, including on election day. (Tr. 134:19-20.) Accordingly, the Union held a pre-election meeting with its Committee Leaders to discuss where the Employer's employees (who are permitted to campaign on the property) should be stationed on the day of the election. (Tr. 134:16-19.) As a result of the meeting, the Union identified specific places where it "wanted people," including in the hallway leading to the polls. (Tr. 167:21-168:6.) The purpose of stationing the Supporters at those locations was to advance the Union's interest in turning out its supporters to vote: "[the Union] had people there to catch people and encourage them to vote because it's a 1-day vote. We wanted to make sure we encouraged everyone to vote." (*Id.*)

The election was held the following day on the Employer's property in the Sunset Room. (*E.g.*, Tr. 21:7-8.) In order to get to the Sunset Room on the second floor, bargaining unit employees would walk through a hallway on the first floor and take the executive elevator.[4] (ER Exs. 1-4 to Pre-Election Hearing; Tr. 23:8-25:20; 63:16-19.)

Consistent with its pre-election meetings with its supporters, on the day of the election, Union Supporters were stationed in the first-floor hallway/executive elevator area where employees would pass in order to get to the polls. The Supporters were a mix of Committee Leaders and other Union supporters. (Tr. 84:6-21.) Witness Marlene Irwin was working at a restaurant adjacent to the hallway area during the entirety of the third voting session, and testified that each time she looked up during her shift she observed a group of 8-10 Supporters in

[4] Alternatively, employees could take the freight elevator to get to the Sunset Room, although there was no testimony that any did so. (Tr. 109:3-10.)

the hallway, including at least one specific individual who was there every time she looked up. (HO Report at p. 8; Tr. 31:1-6; 54:20-25.) She testified unequivocally that the Supporters were there during the entirety of the three hour voting session. (Tr. 31:1-6.)

> **Q. …Ms. Irwin, we want to clarify. You testified that you observed activity in the hallway as you testified to between 4 and 7. Is it your testimony that it occurred during that entire period of 4 to 7 or somehow limited?**
>
> A. No, I saw them. They were there for those hours. . . . It was a long period of time, yes.
>
> ….
>
> **Q. Did you have an impression as to why those red shirts were present in the walkway from 4 to 7 p.m. on the day of the election?**
>
> A. No, I didn't know why they were there. They were just there for that time, and I didn't know why they were there. . . . [M]y opinion of the vote was to come in, go to the second floor, do your voting, and leave the property. . . . ***But they were there for the 3 hours, 4 to 7.***
>
> …
>
> **Q. I just want to make sure, and I understand but it's an important point. You say they were there for 3 hours, right?**
>
> A. Yes.

(Tr. 31:1-6; 59:4-14; 59:18-21 (emphasis added).)[5] Likewise, witness Catherine Rumble testified that when she passed through the hallway/elevator area during the first voting session, there was a group of approximately seven Union Supporters. (Tr. 64:3-15.) She testified that the

[5] In briefing to the Regional Director, the Union attempted to cloud Ms. Irwin's clear testimony on this subject by arguing that it was significant that she could not recall – weeks after the fact – how many times she "looked up" during her shift. No ordinary person would even note, let alone recall, how often they "looked up" during a three-hour portion of a shift. That Ms. Irwin was not comfortable providing rank speculation to satisfy the Union's counsel does not adversely impact the credibility of her unequivocal testimony that the Union supporters were present for all three hours of the final voting session. (Tr. 31:1-6; 59:4-14; 59:18-21.) Moreover, Ms. Irwin's testimony is corroborated by the Union's own International Vice President, who admitted the Union "had [its Supporters] in [the] hallway . . . to catch people there and encourage them to vote." (Tr. 167:19-168:6.)

presence of the Supporters made her feel "a little intimidated, uncomfortable. I felt like they were pressuring people to vote in favor of the Union and pressuring people who were not in favor not to vote." (Tr. 66:16-22.) During the second voting session, witness Rose Keene similarly observed 6-8 Union Supporters "in front of the elevator where we were supposed to go up to vote." (Tr. 94:12-16.) While witnesses Rumble and Keene were not present in the hallway/elevator for the entirety of the first and second voting sessions, the Union's own International Vice President admitted that it "had [Supporters] in [the] hallway . . . to catch people there and encourage them to vote," and nothing in the record suggests that the Supporters were present for less than the entire voting period. (Tr. 167:19-168:6.)

III. ARGUMENT

A. The Regional Director Erred in Failing to Find that the Union Supporters Were the Union's Special Agents

The Regional Director's agency analysis both entirely misses the point of Sunset's argument and fails to capture accurately the nature of the Supporters' relationship with the Union. The Regional Director improperly focuses on whether the Supporters were traditional "general" agents of the Union, something that Sunset does not argue. Rather, even though the Union does not dispute that it authorized and encouraged its supporters to engage in election-day campaigning on its behalf, the Regional Director erroneously failed to analyze whether the Supporters were the Union's special agents for the election day activities in support of the Union. Indeed, a finding that they were special agents should have been compelled by both the facts at the hearing and the common law principles of agency adopted by the Board.

An individual is deemed a party's special agent where the principal "acquiesce[s]" in or authorizes the putative agent to engage in specific conduct for the benefit of the principal." *See, e.g., Davlan Eng'g, Inc.*, 283 N.L.R.B. 803, 804-05 (1987) (union supporters who are authorized

to solicit authorization cards are deemed "special agents" for purposes of assessing statements made in connection with soliciting the cards). While *Davlan* applied this rule in the context of the solicitation of authorization cards, it is not a novel concept that is limited to the specific context of soliciting authorization cards; it is a general principle of agency law adopted by the Board. RESTATEMENT (SECOND) OF AGENCY § 3(2) (1958) ("an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service" is deemed a special agent); *SEIU, AFL-CIO (GMG Janitorial)*, 322 N.L.R.B. 402, 409-10 (1996) (by providing employee with access to blank cards and accepting the blank cards, the union "acquiesced in [employee's] solicitation activities and vested him with apparent authority to act as its special agent. As their special agent, Arrospide's statement to employees while soliciting the cards are imputable to the [union].").

The Hearing Officer and Regional Director's analysis, endorsed by the Board, in *Station GVR Acquisition, LLC*, Case No. 28-RC-208266, 367 NLRB No. 38 (Nov. 26, 2018) ("GVR") representation case illustrates the application of special agency in the election organizing context.[6] In *GVR*, the Union encouraged and authorized its Committee Leaders to solicit employees to complete election day "sign-up" sheets indicating when employees intended to vote and report their responses back to the Union. The employer contended that, in doing so, the Committee Leaders were acting as the Union's special agents. As in the present case, the Union argued that the conduct of the Committee Leaders was not attributable to the Union because in-plant organizing committee members are not generally considered union agents under the

[6] Hearing Officer's Report on Objections and the relevant portion of the Regional Director's Decision and Certification of Representative from *Station GVR Acquisition, LLC and Local Joint Executive Board Of Las Vegas a/w Unite Here International Union*, Case No. 28-RC-208266, 367 NLRB No. 38 (Nov. 26, 2018) are attached under Exhibits F and G, respectively.

Board's traditional agency analysis. The Hearing Officer and Regional Director correctly rejected the Union's argument, finding that because the Union had actually authorized the Committee Leaders' conduct, the Committee Leaders "were special agents of the Petitioner for purposes of [such conduct]." (Ex. G, Regional Director's Decision and Certification of Representative at p. 6.) This is common sense: while a union should not generally be held responsible for the unauthorized activities of potentially overzealous supporters, where the union encourages and authorizes its supporters to engage in conduct on its behalf it bears legal responsibility for the consequences of such conduct. *See generally* RESTATEMENT (THIRD) OF AGENCY § 2.01 (2019). Where a union knowingly benefits from its supporters' unlawful conduct that was done in furtherance of the union's own interest, it should not be permitted to escape any legal consequence because the union merely used supporters instead of its own direct employees. *See, e.g., Bio-Medical Applications of P.R., Inc.*, 269 N.L.R.B. 827, 828 (1984) (holding employee misconduct in connection with election attributable to union where such action was done in furtherance of the union's interest). In other words, the Union cannot engage in unlawful conduct simply by outsourcing the unlawful conduct to its Supporters.

While the Regional Director attempts to distinguish *GVR* on the basis that the union agents there were enlisted in a get-out-the-vote campaign, the agency principles set forth there apply here. In both cases, the Board's agency principles dictate that the union be held responsible for the actions it directs its supporters to take. The Regional Director mistakenly contends that Sunset is only claiming that the Supporters were agents on the day of the election because they were agents during the campaign. However, the Union admits that it specifically encouraged its Supporters to engage in election-day campaigning, discussed with the Supporters the best places to station themselves on election day, and directed them to act as they thought

best;[7] and that the purpose of stationing the Supporters at these locations was to "catch folks" to advance the Union's effort to encourage bargaining unit employees to vote. (Tr. 166:21-168:6; 269:18-20; 272:2-11.) The Union specifically relied upon its Supporters to engage in this conduct because the Union itself could not engage in electioneering within the Employer's facility. (Tr. 134:13-135:4.) As was the case in *GVR*, the Union encouraged, authorized, and knowingly accepted the benefits of its supporters' conduct on election day, and the Supporters are therefore the Union's special agents for purposes of such conduct.[8]

B. The Regional Director Ignored Case Law Holding that the Presence of a Party's Agents in the Pathway to the Polls is Objectionable

The Regional Director further erred in concluding that the presence of the Union Supporters stationed in the pathway to the polling area was not objectionable because the Supporters did not engage in "improper electioneering or coercive speech." (Certification at p. 5.) The Regional Director ignores that the mere presence of a party's agent in the pathway to the polls is – standing alone – objectionable under well-established Board and appellate law even if the agents "do not actually talk to any employee" or otherwise engage in electioneering. *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 992-93 (D.C. Cir. 2001) (citing *Elec. Hose & Rubber*

[7] That the Union Supporters had some discretion in deciding where to station themselves does not affect the agency analysis (unless they were to exercise that discretion contrary to the Union's instructions, which is not the case here). RESTATEMENT (THIRD) OF AGENCY § 2.01(d) (2019) (special agents may exercise considerable discretion provided that such discretion is exercised within the scope of the transaction and does not violate the principal's instructions).

[8] The Regional Director cites to a line of cases holding that general active support of the union and participation in an in-plant organizing committee are insufficient to establish an agency relationship. *United Builders Supply Co*., 287 N.L.R.B. 1364, 1365 (1988); *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983); *Health Care and Ret. Corp. of Am. v. NLRB*, 255 F.3d 276 (6th Cir. 2000); *Advance Prod. Corp*., 304 N.L.R.B. 436 (1991). These cases are simply irrelevant to the instant matter, where the record evidence shows the Union Supporters were acting on specific authority and given specific direction by the Union.

Co., 262 N.L.R.B. 186 (1982) and *Performance Measurements Co.*, 148 N.L.R.B. 1657 (1964)) ("a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote."); *see also ITT Auto.*, 324 N.L.R.B. 609, 623-25 (1997) (presence of party agents in area where employees were required to pass in order to vote was objectionable conduct).

Below, the Union argued that *Katz* has no application because the union agents in that case were in a no-electioneering zone and engaged in boisterous activity. But that was not the basis for the D.C. Circuit's holding. The D.C. Circuit expressly held that "a party's mere presence may be sufficient to justify setting aside an election." *Katz*, 251 F.3d at 992 (emphasis added). If there were any doubt for the basis of the D.C. Circuit's holding, it went on to hold that "a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote" and that the employer's allegations "appear to establish that the union agents' presence outside the church's entrance constitutes conduct of such a nature that it substantially impaired the multi-site employees' exercise of free choice – even if the agents did not actually talk to any employee." *Id.* (emphasis added). In short, it was the union agents' ***presence*** in an area employees passed through to vote – ***not*** the fact that it was a no-electioneering zone or that the agents engaged in boisterous conduct – that was the basis for the D.C. Circuit's holding.

Electric Hose & Rubber Co., 262 N.L.R.B. 186, 216 (1982) buttresses the *Katz* Court's conclusion that a party's mere presence is sufficient to vacate an election. In *Electric Hose*, for employees to get from their work stations to the voting area, they "had to walk past the quality control area and they also had to pass an area where [two supervisors were] standing." *Id.* As the D.C. Circuit correctly noted, "[n]othing in the *Electric Hose* decision indicates that these two

supervisors were anywhere near the actual polling place"; they "simply stood in an area where employees had to pass in order to vote." *Katz*, 251 F.3d at 992. The supervisors did not engage in electioneering, conversations with employees, list-keeping, or anything other objectionable conduct. *See Elec. Hose*, 262 N.L.R.B. at 216. Yet their presence alone was "found to be coercive evidence of such a nature as to have destroyed the laboratory conditions necessary for the conduct of a free and fair election." *Id.* at 216.

Likewise, in *ITT Automotive*, a group of supervisors gathered in a circle along the "main north-south" aisle of the facility that employees passed through in order to vote. 324 N.L.R.B. 609, 624 (1997). To get to the voting room, the employees would go "from the main aisle, along the east-west aisle leading to the lunchroom, and left to the stairs" (the voting room was on the second-floor of the facility). *Id.* Just as in this case, there is no indication that the area where the supervisors gathered was demarcated as a no-electioneering zone, and the area was "not near the polling place." *See id.* (internal brackets omitted). Also worth noting is that "the persons standing in the circle would change from time to time," and that there is no indication that the individuals in the circle talked with employees or engaged in any other objectionable conduct beyond merely standing in the area. *Id.* The ALJ, affirmed by the Board, nevertheless had little trouble concluding that the "continued presence" of the supervisors in the area was objectionable and grounds to overturn the election. *Id.* at 625.

Indeed, the authority cited by the Regional Director confirms that *Katz* controls here. In *Performance Measurements Co., Inc*., 148 NLRB 1657, 1659 (1964), the Board held, "while we agree that the brief forays into the election area alone may not tend to interfere with the free choice of the employees, the continued presence of the Employer's president at a location where

employees were required to pass in order to enter the polling place was improper conduct" and grounds to set aside the election.

Cases cited by the Union below are inapposite here and do not contradict the *Katz* line of authority. In *C&G Heating & Air Conditioning, Inc.*, the union representative was inside a parked truck for a portion of the voting session and "there [was] no evidence that any employee entering the garage to vote saw the union representative and recognized him as a union representative." 356 N.L.R.B. 1054, 1054 (2011). In *Parkview Community Hospital Medical Center*, the alleged agent was stationed outside the building where the polling occurred – there is no indication that he was in the pathway to the polls. No. 21-RC-121299, 2015 WL 413882, at *1 n.3 (Jan. 30, 2015). Likewise, in *Aaron Medical Transportation, Inc.*, there is again no indication that the union agents were stationed in the pathway to the polls. No. 22-RC-070888, 2013 WL 3090117, at *1 n.3 (June 19, 2013). None of these cases are remotely similar to the facts in the present case (or the cases discussed above), where voters had to pass through a throng of party agents stationed in the pathway to the polls.

Similarly, the cases cited below by the Union in support of its argument that the "mere presence of a party agent near the polls" is not grounds to overturn an election have no application here. In *Mountaineer Park, Inc.*, the Board expressly noted its prior holding that the "continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct." 343 N.LR.B. 1473, 1484 (2004). However, it held that the principle did not apply on the facts of the case because there was no evidence that "multiple employees passed by [the employer's supervisor] on their way to the polling place" or that there was a "continued presence by [the supervisor] near the polling area or that employees were required to pass by him in order to vote." *Id.* In *J.P. Mascaro & Sons*, the

Board distinguished *Nathan Katz, Electric Hose,* and *ITT Automotive* on the grounds that – again – "there [was] insufficient evidence that employees had to pass by Mascaro in order to vote." 345 N.L.R.B. 637, 639 (2005). The plant manager in *Hanson Aggregates Central, Inc.* had a legitimate business reason to be near the polling area, and was present only for approximately 15 minutes. 337 N.L.R.B. 870, 881 (2002). Likewise, in *Standard Products Co.*, the supervisor was briefly present near the polls on three occasions, each time for a legitimate business purpose, and talked with the employees waiting to vote only for the purpose of clearing the area for the plant's forklift operator. 281 N.L.R.B. 141, 164 (1986). *Boston Insulated Wire & Cable Co.* dealt with whether the conduct of the union's agents near the polls constituted prohibited electioneering; the Board did not even consider, let alone rule, on whether the presence of the voters in the pathway to the polls was objectionable under the line of cases discussed above (none of which had even been decided when the *Boston Insulated* decision was issued). 259 N.L.R.B. 1118, 1119 (1982). *Setzer's Super Stores, Inc.* also pre-dates the line of cases relied upon by the Employer and, moreover, "the union representatives were never in the polling places or even in the areas near the polling places while the election was in progress at any store, or in the stores while the election was in progress at any store." 123 N.L.R.B. 1051, 1053 (1959).

In sum, both Board and appellate law consistently and correctly hold that a party engages in objectionable conduct when they station agents in a pathway that voters pass through in order to get to the polls, regardless of whether the area is demarcated as a no-electioneering zone and regardless of whether the agents engage in any further objectionable conduct. Thus, as all of the record evidence introduced at the hearing either directly proved or supported the conclusion that the Union Supporters were continuously present in the pathway to the polls during the voting

sessions, the Board should set aside the Regional Director's erroneous conclusion and vacate the election based on the Union's objectionable presence.

C. The Regional Director Erred in Giving No Weight to the Section 7 Right of Employees to Refrain From Union Activity

Section 7 expressly provides employees with the right to refrain from union activity. 29 U.S.C. § 157; *see generally id.* at 278 ("By §7 of the Act employees have the right not only to 'form, join, or assist' unions but also the right 'to refrain from any or all such activities.'"). The Regional Director, like the Hearing Officer before him, erred by giving no consideration to how the "We Are Sunset Station" booklet infringed on this critical statutory right. In this way, the Regional Director erroneously privileged employees' right to support the Union over the right to refrain from union activity. The Board should take this opportunity to rectify this error and to properly balance the competing rights afforded to employees that are enshrined in Section 7.

By circulating a comprehensive catalog of those who allegedly intend to vote "Yes," the "We Are Sunset Station" booklet inversely identifies those employees who are choosing to refrain from supporting the Union (either because they intend to vote "No," or simply wish to refrain from getting involved altogether). Those employees did not in any manner consent to having the Union broadly disseminate their views. Yet, through its publication of the booklet, the Union made known to the entire bargaining unit the employees that do not support the Union, singling out those employees for increased pressure, solicitation, and harassment by their co-workers. Put simply, an employee who wishes to keep her views private and refrain from engaging in Section 7 activity has the right to do so. By inversely identifying the bargaining unit employees who do not support the Union, the Union stripped those employees of their rights without their consent.

The Regional Director did not pursue the requisite case-specific analysis required to assess the Union's objectionable conduct and instead manufactures an irrelevant and absurd strawman - that Sunset is somehow arguing that all manifestations of union support infringe on the Section 7 right to refrain from union activity. The Regional Director's strawman is far from the "natural conclusion" of Sunset's objection to the "We Are Sunset Station" booklet – one need not condemn all displays of union support to find that the manner in which this particular booklet was created and disseminated infringes on employees' Section 7 rights. The Regional Director erroneously ignores the stark qualitative difference between the ability to identify non-participating employees given a compiled catalog of Union supporter identities and the ability to make inferences about Union support based on the lack of more run-of-the-mill individual displays of union support. Because, as shown above, the circumstances surrounding the "We Are Sunset Station" booklet denied the rights of employees to refrain from manifesting support publicly for or against the Union, the Regional Director's disregard of that evident and unlawful effect is reversible error.

The Union's compilation and dissemination of the "We Are Sunset Station" booklet is also objectionable under the Supreme Court's decision in *National Labor Relations Board v. Savair Manufacturing Company*, 414 U.S. 270, 277 (1973). In *Savair*, the Supreme Court explained why a union cannot offer to waive initiation fees for those that sign a recognition slip, including the creation of a false sense of employee support during the election campaign and that, although not being legally bound to vote for the union, "certainly there may be some employees who would feel obliged to carry through on their stated intention to support the Union." *Id.* at 277-78. The Regional Director simply brushed aside the broad, generally applicable concerns about the impact of certain union tactics articulated by the Supreme Court in

Savair, finding them inapplicable simply because the instant case does not involve a waiver of initiation fees.

The problem with the Regional Director's analysis is that, even though the factual context is different, the same dangers identified in *Savair* are present here. There are a number of reasons that an employee may agree to have her picture taken and disseminated by the Union. Of course, one possibility is that the employee simply supports the Union. But the employee may also believe it is easier to simply "give in" than to face relentless pressure and harassment by other Union supporters in the workplace. Likewise, the employee may wish not to be singled out to her co-workers as one of the employees who does not support the Union. Or the employee may view it as a means to stop the Union from disrupting her personal life through off-hours house visits and telephone calls. In short, just as it is error to conclude that an employee who signed a recognition slip did so because the employee supported the Union, it is error to conclude that an employee who allows her picture to be disseminated necessarily supports the Union. *See id*. As recognized in *Savair*, this issue is not cured simply because the employee may still vote "No" in the privacy of the election booth; it allows the Union to create a false portrait of support, and may create a sense of obligation in some employees to follow through on their stated intention to vote "Yes." *Id.* Nor is it cured simply because one employee (of many) was able to overcome this coercive sense of obligation imposed by the Union and permitted to rescind his or her authorization to appear in the booklet.

The Regional Director erred by not recognizing that the coercive impact of "We are Sunset Station" booklet on both those employees depicted in the booklet and those that declined to appear. To the extent that current Board law permits this coercion, it is wrongly decided, inconsistent with *Savair*, and should be overruled.

D. The Regional Director Erred by Finding that the Combined Effect of the Union's Objectionable Conduct Was Not Sufficient to Vacate the Election

Finally, even if the Union's objectionable conduct was not sufficient to vacate the election in isolation, the combined effect of the Union's election misconduct demonstrates that such a result is justified. *E.g.*, *NLRB v. Monark Boat Co*., 715 F.2d 355, 359 (8th Cir. 1983) ("[E]ven where an incident of misconduct, not insubstantial in nature, is insufficient by itself to show that an election was not an expression of free choice, two or more such incidents, when considered together in the totality of the circumstances, may be deemed sufficient to support such a conclusion."); *Bauer Welding & Metal Fabricators, Inc. v. NLRB*, 676 F.2d 314, 318 (8th Cir. 1982) (same); *see also Pac. Coast Sightseeing Tours & Charters, Inc.*, 365 N.L.R.B. No. 131 (2017) (The standard for evaluating objectionable conduct is "whether the alleged misconduct, taken as a whole, warrants a new election because it has the tendency to interfere with employees' freedom of choice and could well have affected the outcome of the election.").

The Regional Director distinguished these cases by asserting that no objectionable conduct occurred here. However, as discussed above, the finding of no objectionable conduct is erroneous. Additionally, consideration of the combined effect of the Union's election tactics on voting employees vividly demonstrates their disruptive effect on the employee's freedom of choice. As set forth above, the identities of the individuals who did not support the Union were known to bargaining unit employees, including those stationed outside the hallway and elevator leading directly to the voting area. The mere presence of the Supporters in the hallway/elevator area leading to the polls was inherently coercive and objectionable. But here, that coerciveness was further heightened because the identities of voters who did not intend to support the Union could be determined by reference to the booklet. Employees intending to vote "No" should not be required to pass through a gauntlet of individuals with adversarial views in order to exercise

their right to vote.[9] The Regional Director failed to consider how the dissemination of the "We Are Sunset Station" booklet worked in concert with the presence of the Union supporters in the hallway to chill and intimidate potential "No" voters. The Regional Director's failure to recognize the damaging effect on the employees' freedom of choice is further error warranting that the Certification be set aside and the tainted election results be vacated.

IV. CONCLUSION

For the reasons set forth above, the Employer's Request for Review should be granted, the Regional Director's Certification should be set aside and the results of the election should be vacated.

Respectfully Submitted,

Date: November 19, 2019

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[9] The Union's claim that the employees were there for innocuous reasons is disingenuous and transparent. Employees walking in the pathway to the polls were clearly aware that the election was being held and where the voting would take place. Indeed, as Employer asserts, the purpose was to intimidate eligible voters to vote yes, or if not, to stay away. (*See*, *e.g.*, Tr. 64:3-15, 66:16-22.)

CERTIFICATE OF SERVICE

I hereby certify this 19th day of November, 2019, that a copy of the *EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE* was e-filed with the Board, and electronically served on:

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